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In the
Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1115

JOHN M. FARRELL and FRANCIS T. GLYNN,
PETITIONERS

v.

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

The Petitioners John M. Farrell and Francis T. Glynn pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Judicial Court of Massachusetts entered in this proceeding on November 4, 1971.

Opinion Below

The opinion of the Supreme Judicial Court is reported in Massachusetts Advance Sheets (1971) 1367, and 275 N.E. 2d 33. It is reproduced in Appendix B.

Jurisdiction

The judgment of the Supreme Judicial Court of Massachusetts was entered on November 4, 1971. The time for filing this Petition was, on January 25, 1972, by order of Mr. Justice Brennan, extended to (and including) March 3, 1972. This Petition is filed within the time so extended. This Court's jurisdiction is invoked under 28 U.S.C. s. 1257 (3).

Questions Presented

I. Whether in a criminal jury trial, a rule authorizing the prosecutor to communicate to the trial judge, *ex parte*, matter bearing on the merits or on disposition, deprives the defendant of a fair trial before a fair tribunal in violation of the Due Process Clause of the Fourteenth Amendment?

II. Whether in a criminal jury trial a rule authorizing the prosecutor to "specifically limit" to particular defendants evidence *admissible* against a larger group, deprives each member of the group of a fair trial in violation of the Due Process Clause of the Fourteenth Amendment?

III. Is Due Process of Law denied in a criminal jury trial upon a charge of giving, offering or promising a bribe, by requiring the jury to state whether the defendant gave, whether he offered, whether he promised, before arriving at a general verdict?

IV. Whether uncontradicted testimony of witness and prosecutor that witness requested, and prosecutor agreed, that expense-reports not be used in any pub-

lic proceeding, establishes an agreement to suppress evidence in violation of the Due Process Clause?

Constitutional and Other Provisions Involved

Sixth Amendment to the Constitution Of the United States

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; and to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Fourteenth Amendment to the Constitution Of the United States

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Massachusetts General Laws, Chapter 233, Sections 13A-13D (*Uniform Law to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings*, inserted by Mass. St. 1937, c. 210, pp. 177-180 inc.). The Statute is printed in Appendix "H".

Statement of the Case

The questions here presented arise out of two criminal jury trials before the same judge (App. B, p. 1) of the forty-two-judge Massachusetts Superior Court. All indictments in both cases were assigned to him in the fall of 1964.[1] The indictments were handed down in 1964 upon evidence presented to a special grand jury by Assistant Attorney-General Marshall Simonds, whose principal witnesses were J. Miller Redfield and William F. Heath, public-relations vice-presidents of American Investment Company of Illinois, a major competitor of the defendant loan companies. Simonds made use of Heath's weekly expense-reports to American in his presentation.[2]

The first trial, which began on July 18, 1966, involved indictments of Farrell, Glynn, and eleven others for conspiring to bribe Hanley, the State Supervisor of Small Loans (No. 11900) and Garfinkle, a member of the Rate Board (No. 11910). In Counts I and II of additional indictments said defendants were charged with bribing Hanley and Garfinkle, respectively. Hanley and Garfinkle were charged with conspiring to solicit bribes (No. 11974) and in other indictments, with soliciting bribes (App. B, pp. 22-23). American Investment, Redfield and Heath were named as co-conspirators but not defendants in 11900 and 11910.[3]

Ten *ex parte* applications for out-of-state process against Redfield and four other persons employed by American Investment were made by the prosecutor on July 20, August 16, October 21 and 26, 1966, to the trial judge who on each occasion granted the application and impounded the papers. The petitioners first heard of this some five months after their trial and conviction, and thereafter moved to

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[1] Pretrial Transcript, 11/5/64, pp. 1, 36.

[2] R. 2132.

[3] R. 1876, 2285. The Supreme Judicial Court erred in failing to set this forth at pp. 193, 199, and 202 of App. B, infra.

revoke the impounding orders. It then appeared that on the opening day of the first trial the prosecutor stated, and the trial judge certified to the California Courts that Redfield had "personal knowledge that a sum of money was delivered to another for the purpose of being paid to an executive officer . . . which matters he has testified to before the . . . Grand Jury." Like statements as to personal knowledge were made on the other occasions. (App. B, pp. 116-118).[4] None of these persons was called to the stand, though Redfield appeared in the courtroom on September 14, after adjournment, and was ordered to remain in Massachusetts until October 14, 1966, on an understanding between the Court, the prosecutor and Redfield's counsel that he might return to California until his presence was actually needed.[5] Question I is raised as to the First Trial by motions for new trial filed by Farrell and Glynn on July 18, 1967;[6] by their exceptions to the denial of each motion on July 19, 1967;[7] and by Farrell's Assignment 8, and Glynn's Assignment 13.[7a] It is raised as to the Second Trial by motions to disqualify filed by Farrell and Glynn and by their exceptions to the denial thereof,[8] by their Assignments Nos. 6.[9] (In that trial applications for out-of-state process were handled by another than the trial judge.)[10] The Supreme Judicial Court expressly rejected the petitioners' constitutional contention. (App. B, pp. 116-118, 178.)

Between August 11 and October 6, 1966, the prosecution presented 227 items of evidence. 8 items were admitted

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[4] Text of applications at R. 1603-1605, 1699-1701, 1739-1754, 1762-1773. Impounding orders at R. 1605, 1701, 1741, 1744, 1747, 1751, 1754, 1764, 1767, 1770, 1773. Certificate of trial judge at R. 1605A-1605C. Revocation of impounding orders, R. 209.

[5] I Tr. 2969-2978.

[6] R. 1932-1948.

[7] R. 1949-1950. The trial judge wrote no opinion.

[7a] R. 3796, 3739.

[8] R. 10,838; 10,847.

[9] R. 12,336; 12,298.

[10] R. 10,408.

against all defendants, and each of 219 items was admitted against one or more named defendants.

On October 17 and 31, 1966, the trial judge determined that 8 defendants (Barber, Pratt, Household, Farrell, Glynn, Beneficial, Woodcock and Liberty) had conspired as charged in 11900 and 11910, and that each had authorized the others to do any act necessary to bribe Hanley and Garfinkle as charged, respectively, in Counts I and II of certain indictments. In ten motions the prosecutor requested the judge to change the original limitations on certain items of evidence. Three of these, filed on October 30, 1966, ask that specified items be admitted against Household, Beneficial and Liberty (on 11900, 11910, and the bribery counts, respectively) "except insofar as the individual items are specifically limited to particular defendants."[11] The motion relating to 11900 has 24 "specifically limited" items, that relating to 11910 has 23, and the bribery motion 26 as to Count I and 22 as to Count II. After hearings in the absence of the jury the judge, with minor exceptions, granted the ten prosecution motions in his decisions of October 17 and 31. (App. C, App. D.)

Thereafter, on November 2, 1966, the judge addressed the jury with respect to 48 items of evidence which he recalled to their attention, instructing them that each such item was thenceforth to be considered against additional persons (in accordance with his decisions of October 17 and 31).[12] So far as they affect 11900, 11910 and the bribery charges, such instructions (together with the original limitations), are shown on Figure 1 (p. 7).

Thereafter, the judge directed verdicts for certain defend-

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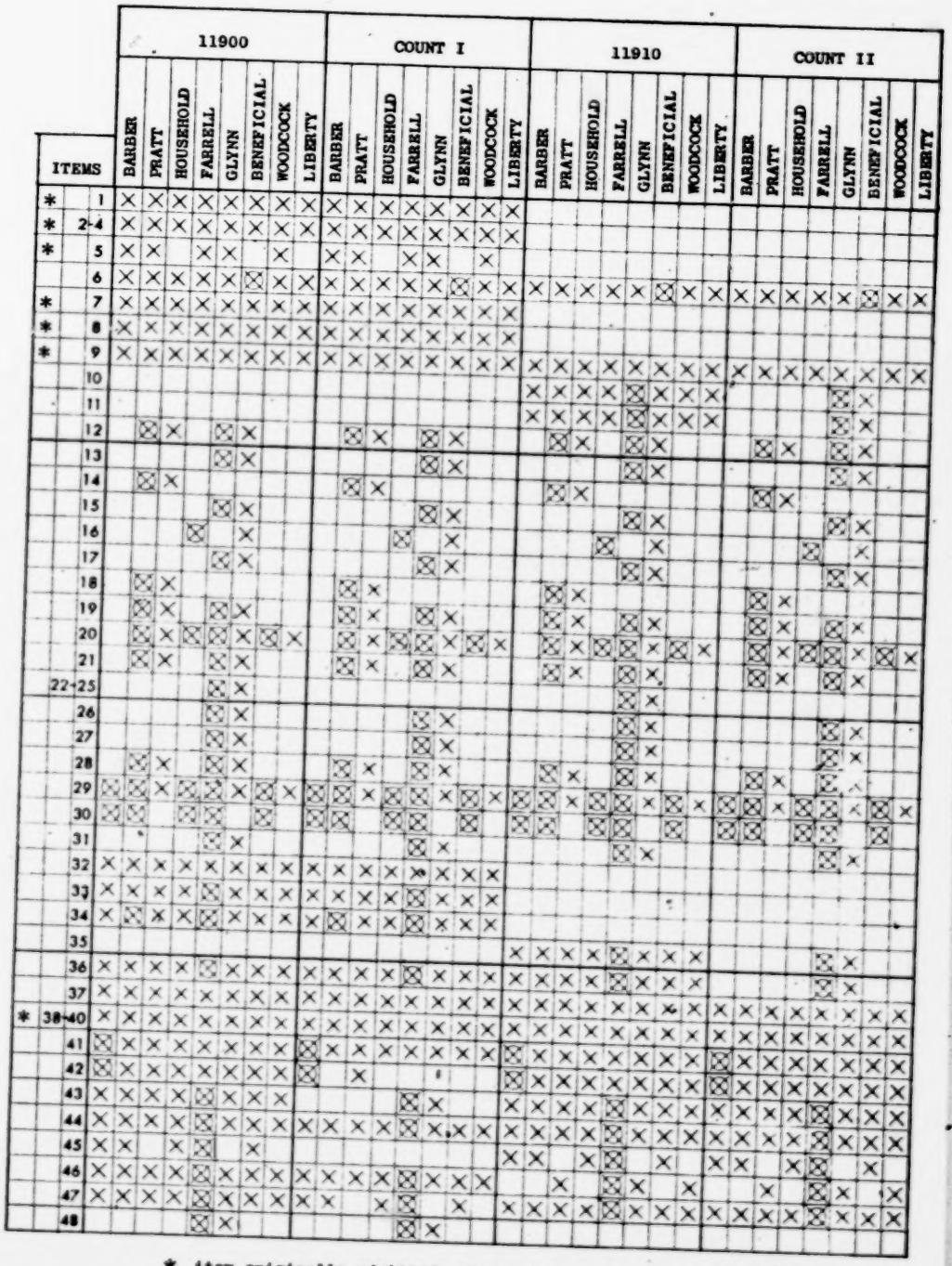
[11] R. 1756, 2279, 2223.

[12] I Tr. 5208-5239. The trial judge described to the jury over and over again the criminal charges: the charge of conspiring to bribe Hanley, twenty-five times; of conspiring to bribe Garfinkle, eighteen times; of bribing Hanley, twenty-five times; of bribing Garfinkle, twenty-three times.



* item originally admitted only against Hanley or Garfinkle.

FIGURE 1 ⊠ original admission.

× subsequent admission, Nov. 2, 1966

ants[13] and struck such evidence as had been limited to them.[14] On December 15 in his charge the judge recalled to the jury that there had been "... many limitations imposed during the course of this trial, and you must give effect to them."[15]

Question II is raised as to the First Trial by exceptions of Farrell and Glynn to the judge's decisions of October 17[16] and 31[17], to his instructions to the jury on November 2, 1966[18], and by Farrell's Assignments of Error 1-3; Glynn's Assignments 1-3.[18a] The Supreme Judicial Court expressly rejected the federal constitutional claim of petitioners. (App. B, pp. 121-127, particularly at 124-126.)

In submitting to the jury 8 indictments (of Barber, Pratt, Household, Farrell, Glynn, Beneficial, Woodcock and Liberty, respectively) charging in Count I bribery of Hanley and in Count II bribery of Garfinkle, the court required the jury to answer as to each count, prior to reaching its general verdict, the following: 1 (a) Did the defendant give a bribe? 1 (b) If yes, in what city or state did he do so? 2. Did the defendant offer a bribe? 3. Did the defendant promise a bribe? (App. B, p. 110). The jury answered "No," blank, "Yes", "Yes."[19] The trial judge charged the jury that in order to convict it need find but one of the three elements—gift, offer or promise.[20]

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[13] I Tr. 6119-6128.
[14] R. 1819-1820.
[15] I Tr. 7217.
[16] I Tr. 4375-6.
[17] I Tr. 5048-5050.
[18] I Tr. 5182-5183, 5209-5210, 5244-5247.
[18a] R. 3779-3793, 3723-3735.
[19] I Tr. 7419-7423.
[20] I Tr. 7265.

Question III is raised by exceptions of Farrel and Glynn[21] to the submission of special questions and by Farrell's Assignment 15 and Glynn's Assignment 7.[22] The Supreme Judicial Court expressly rejected petitioners' federal constitutional contention. (App. B, pp. 110-111.)

On December 18, 1966, the jury returned a verdict in the First Trial that all defendants were guilty as charged, except that it found Hanley not guilty on Count II of 11983-11987 inc., and Garfinkle not guilty on Count II of 11923, 11930, 11935-11937 inc., all of which allege acceptance of a bribe.[23] On January 8, 1967, the trial judge imposed sentences of imprisonment on the individual, and fines on the corporate defendants, and stayed them pending appeal. Farrell and Glynn filed timely appeals and assignments of error pursuant to Mass. G.L. c. 278, ss. 33A-33G.[24]

In the Second Trial fourteen persons, including Farrell and Glynn were placed on trial on a charge of conspiring to bribe Hanley; one such defendant, Local Finance Company, was also tried for bribing Hanley; Hanley was tried on 19 indictments for requesting and accepting bribes. American Investment Co. of Illinois, Redfield and Heath were named as co-conspirators in 11908.

The prosecution presented substantially all its evidence between August 16 and November 14, 1967. Each of 14 items was admitted against all defendants; each of 229 was admitted against one or more defendants named by the prosecutor. On November 27, 1967, the trial judge found that 8 defendants (Barber, Pratt, Household, Farrell, Glynn, Newhall, Beneficial, Local) had conspired as

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[21] I Tr. 7167, 7313.

[22] R. 3802, 3737.

[23] App. E, pp. 1-3.

[24] Appeals: Farrell, R. 1882, 1890, 1954, 2219, 2291, 2295, 2301, 2302; Glynn, R. 1882, 1889, 1953, 2217B, 2292, 2400. Assignments of Error: Farrell, R. 3779; Glynn, R. 3723.

charged in 11908 together with American Investment Company, Redfield and Heath. (App. B, p. 185; R. 13091.)

On November 30, 1967, the judge acted on 8 motions by the prosecution to admit 100 items of evidence against addition defendants. The judge denied the motions as to 17, and granted them as to 83 items. (App. F, pp. 6-23 inc.) On December 12, 1967, after combining certain items so as to reduce the number to 66, the judge recalled each such item to the jury, stating that it had been further admitted against one or more of the eight found to have conspired. (II Tr. 6016-6033). Those instructions (together with the original Limitations) are shown on Figure 2 (p. 11).

In no instance did the trial judge enlarge a limitation placed on evidence by the prosecution "whether the limitation was stated when the evidence was originally offered, or was stated when the Commonwealth sought to enlarge the applicability of evidence." (App. G, p. 3.) In his charge the judge instructed the jury that they must give effect to the limitations upon the evidence.[24a]

Question II is raised as to the Second Trial by the exceptions of Farrell and Glynn to the judge's decision of November 30;[25] their exceptions to the instructions given to the jury on December 12;[26] and their Assignments of Error (Farrell, Glynn Assignments 1, 2).[27] The Supreme Judicial Court expressly rejected the federal constitutional contention made by petitioners. (App. B, pp. 121-127.)

[24a] II Tr. 11,592-11,593.
[25] II Tr. 5862-5863, 5864.
[26] II Tr. 6036 (Farrell), 6035 (Glynn).
[27] R. 12330-12334, 12293-12296.

11908

ITEMS	BENEFICIAL	NEWHALL	FARRELL	GLYNN	HOUSEHOLD	BARBER	PRATT	LOCAL	HANLEY
1	X	X		X				X	⊠
2	X	⊠		X					
3	X	⊠		X	X				
4	X	⊠		X					
5	X	⊠		X					
6	X	X		X				⊠	
7	X	⊠		X				⊠	⊠
8	X	⊠		X				⊠	⊠
9	X	⊠		X				⊠	⊠
10	X	X		X				⊠	⊠
11	X	X		X				⊠	⊠
12	X	⊠		X				⊠	⊠
13	X		X	⊠	X				
14	X			⊠	X			⊠	⊠
15	X			⊠	X		X	⊠	⊠
16	X			⊠	X		X		
17	X		X	⊠	X		X	⊠	⊠
18	X							⊠	
19	X			⊠					⊠
20	X	⊠		X				⊠	⊠
21	X	⊠		X					
22	X	⊠		X				⊠	
23	X			X				⊠	⊠
24	X			X				⊠	⊠
25	X			X				⊠	
26	X			⊠					
27	X		⊠	⊠	X				
28	X		⊠	⊠	X				⊠
29	X		⊠	⊠	X				⊠
30	X		⊠	⊠			X		⊠
31	X		⊠	⊠	X		X		⊠
32	X		⊠	⊠	X		X		
33	X		⊠	⊠	X		X		⊠

11908

ITEMS	BENEFICIAL	NEWHALL	FARRELL	GLYNN	HOUSEHOLD	BARBER	PRATT	LOCAL	HANLEY
34	X		⊠	⊠	X		X		
35	X		⊠	⊠	X		X		
36	X		⊠	⊠	X		X		
37	X		⊠	⊠	X		X		⊠
38	X		⊠	⊠	X		X		
39	X		⊠	⊠	X	X	X		⊠
40	X		⊠	⊠	X		⊠		
41	X		⊠	⊠	X		X		
42	X		⊠	⊠	X		X		⊠
43	X		⊠	⊠	X		⊠		
44	X		⊠	⊠	X	X	⊠		
45	X		⊠	⊠	X	X	⊠		
46	X		⊠	⊠	X	⊠	⊠		
47	X		⊠	⊠	X	X	X		
48	X		⊠	⊠	X		⊠		
49	X		X	X	X		⊠		
50	X		X	⊠	X		X		
51	X		X	⊠	X		X		
52	X		X	X	X	⊠	⊠		
53	X		X	⊠	X	X	X		
54			X	X	X		X		⊠
55	X		X	X	X		X		⊠
56	X		X	X	X		X		⊠
57	X		X	⊠	X		X		⊠
58	X		X	⊠	X		X		⊠
59	X		X	⊠	X		X		⊠
60	X		X	⊠	X		X		⊠
61	X		X	⊠	X		X		⊠
62	X		X	⊠	X		X		⊠
63	X		X	⊠	X		X		⊠
64	X			⊠				⊠	⊠
65	X		X	⊠	X		X		⊠
66	X		X	⊠	X		X		⊠

FIGURE 2

⊠–original admission

X–subsequent admission December 12, 1967

A verdict was directed for Local Finance Co. on the bribery charge.[28] On June 10, 1968, the jury found the defendants guilty on the remaining charges.[29] On June 20, 1968, the trial judge imposed sentences of imprisonment on the individual defendants, and stayed them pending appeal.[30] The petitioners filed timely appeals and assignments of error under G.L. c. 278, ss. 33A-33G.

Facts Relating to the Suppression of Evidence in the First Trial

Heath, the prosecution's principal witness during the first trial, testified that he and Glynn, who were public relations men, met with Hanley an average of two or three times a week between 1960 and September, 1963, at various restaurants and places of entertainment. At all of these meetings the bills were paid *pro rata* by the public relations men present. (App. B, pp. 38-39.) He further testified that during the summer of 1962 he and Glynn conversed three or four times with Hanley in restaurants about the possibility of paying money to Hanley to insure a favorable result from the Small Loans Rate Board. (App. B, pp. 39-40.)

Prior to cross-examination of Heath, all defense counsel requested the prosecutor that there should be no holding back of things that would be exculpatory or a source of impeachment. (App. E, p. 33.) The prosecutor then possessed weekly reports made by Heath to his company showing his reimbursable expenses during the summer of 1962 (App. E, p. 15). They do not show any entries for restaurant meetings with Hanley and Glynn during that summer. (App. E, p. 21.) They were not shown to defendants. (App. E, p. 15.)

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[28] II Tr. 11,121.
[29] II Tr. 11,171.
[30] II Tr. 11,865; 11, 883.

Defendants first learned of the expense accounts during the second trial. There Heath testified that he had been promised by the prosecutor Simonds that "... the expense accounts were not to be used at any trial..." Simonds testified "... I told him (Heath) that I understood his hope and request that they (Heath's expense reports) would not become in anyway involved in any public proceedings, and I told him I would do what I could to accomplish that as long as my efforts did not interfere with the proper investigation of the matter..."

The above matters were placed before the trial judge by motions for new trial supported by affidavits of counsel.[31] No counter-affidavits were filed by the prosecution and the petitioners' motions for new trial were heard solely on the affidavits.[32] (App. E, pp. 16-17.)

Question IV is raised by the exceptions of Farrell and Glynn[33] to the denial of their Motions for New Trial filed on September 12, 1968, and by Assignments of Error in the First Trial (Farrell Nos. 4, 5; Glynn, Nos. 14, 15.)[34]

Reasons for Granting the Writ

1. The Decision Below Applies a Uniform Law (Effective in Forty-nine Jurisdictions) To Authorize a Prosecutor To Communicate *Ex Parte* With the Trial Judge in Jury (But Not Jury-waived) Cases

Cynics say that every prosecutor would like to speak to the trial judge alone, if only there were a safe way. Is such

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[31] R. 2174 (Farrell), 2116 (Glynn).

[32] App. E, pp. 16-17. Thus none of the oral testimony heard by the trial judge with respect to the motions for new trial (including that of Heath and the prosecutors Simonds and Travers) was offered by or admitted against, petitioners. None of the argumentative findings made by the trial judge (App. E, pp. 31-32, Findings a-d inclusive), which are based on the oral testimony, are applicable to petitioners.

[33] R. 2218 (Farrell), 2217A (Glynn).

[34] R. 3793-4 (Farrell), 3740-3741 (Glynn).

a way discovered in this case? The Supreme Judicial Court holds that the *Uniform Law to Secure the Attendance of Witnesses From Without a State in Criminal Proceedings*[35] authorizes a trial judge sitting with jury to entertain an *ex parte* application from the prosecutor, grant it, and conceal the transaction from the defendants by impounding the papers. (App. B, pp. 116-118, 178.) It thus approves the method by which the prosecutor created a strong bias in the trial judge before a single juror was drawn in the First Trial, a bias shown by his certificate that "... J. Miller Redfield has *personal knowledge* that a sum of money was delivered to another for the purpose of being paid to an executive officer ..."

In the case at bar the bias produced in the trial judge by the rule permitting *ex parte* applications is thus certified by his own hand. In the general case, we submit, the *probability* of unfairness is manifest and will deprive a defendant of the "fair trial in a fair tribunal" guaranteed by the Due Process Clause. *In re Murchison*, 349 U.S. 133, 136. The situation calls for a *per se* rule prohibiting application to the trial judge. Cf. *Coolidge* v. *New Hampshire*, 403 U.S. 443, 450; 91 S. Ct. 2022, 2029 (1971).

The fact, insisted upon by the court below (App. B, p. 117), that the papers filed under the *Law* were never seen by "the jurors, who, of course, were the finders of fact" does not alter the case. The bias of the trial judge might be communicated to the jury by a single instruction. *Gregg* v. *United States*, 394 U.S. 489, 492. In a complete trial, the exposure discussed in *Gregg* is many times multiplied.

Entirely apart from any communication with the jury, a biased judge may vitally affect a defendant's rights by *his own findings of fact* and exercise of discretion. Under

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[35] Mass. General Laws, c. 233, ss. 13A-13D inc., reproduced in Appendix H. The *Law* is in effect in forty-five states, the District of Columbia, Puerto Rico, the Canal Zone and the Virgin Islands.

the rule of the court below it may well occur that a defendant is forced to appeal for protection against, say, prejudicial publicity, to a judge who is himself prejudiced by *ex parte* contact with the prosecutor (which is not known to the defendant).[36] It is a minimum requirement of Due Process in a criminal case, we submit, that a prosecutor not convey information or discuss any matter relating to the merits of the case or sentence with the trial judge in the absence of counsel for defendant.[37] *Haller* v. *Robbins*, 409 F.2d 857, 859 (1st Cir., 1969).

The rationale given for the decision below, that "the jurors, who, of course, are the finders of fact", never saw the papers filed under the *Uniform Law*, makes it clear that the rule allowing *ex parte* application to the trial judge does not extend to trials without jury. A defendant can thus completely escape the dangers of the rule by waiving a jury. Does it not follow that the decision below violates the Due Process Clause of the Fourteenth Amendment by "needlessly" encouraging defendants to waive their Sixth Amendment right to trial by jury? *United States* v. *Jackson*, 390 U.S. 570, 583.

Is there any need for *ex parte* applications? Compare the problem presented by applications of impecunious defendants under F.R. Cr. P. 17; *Holden* v. *United States*, 393 F. 2nd 276 (1st Cir., 1969). Is there any need to apply to the *trial* judge? The *Uniform Law* provides simply that "... a justice or special justice ..." of the court in which the witness is wanted, may issue the initial certificate. (App. H, p. 3.) The trial court in the present case, the Superior

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[36] This very situation occurred during the First Trial. App. B, pp. 108-110.

[37] Under the *Jencks Act*, 18 U.S.C. s. 3500, *a defendant may ask* that the trial judge examine *in camera* a government paper which defendant may never be shown. This is quite distinguishable from secret *ex parte* contact *initiated by the prosecutor*. See *United States* v. *Persico*, 349 F.2d 6, 13 (2d Cir., 1965); *United States* v. *Schipani*, 362 F.2d 825 (2d Cir., 1966).

Court of Massachusetts, had forty-two justices during these Trials.[38] During the Second Trial, after the present point had been raised, applications were handled by another than the trial judge.

It is now apparent, we submit, that serious Due Process questions are raised by the manner in which the court below applied the *Uniform Law*. Questions arising in the application of the *Law* were left open in *New York v. O'Neill*, 359 U.S. 1, 3, 8, in which this Court, over the challenge of a witness, held the *Law* not unconstitutional on its face. Those questions now call for review.

II. The Decision Below, For the First Time in Any Jurisdiction, Confers on the Prosecutor the Power To Determine the Final Application of Evidence in a Multiple-defendant Trial.

In these proceedings the prosecutor persuaded the trial judge to accept a stunning innovation in the trial of conspiracy cases:

> "Whenever the Commonwealth has specifically limited evidence which it offered, this Court has not attempted to enlarge the scope of evidence as thus limited . . . whether the limitation was stated when the evidence was originally offered, *or was stated when the Commonwealth sought to enlarge the applicability of evidence*. This Court has in some instances denied *but never enlarged* the scope of application requested by the Commonwealth . . ."[39] (App. G, p. 3; italics ours.)

Does a rule which gives the prosecutor such power violate Due Process requirements? Unquestionably if A is

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[38] Mass. General Laws, c. 212, s. 1, as last amended by St. 1962, c. 721. See now St. 1967, c. 850.

[39] This language from the opinion of the trial judge of March 20, 1968, is quoted in the opinion of the court below. App. B, p. 125, n 67.

tried alone for conspiring with B and C, the prosecutor may freely decide to offer, or not to offer, any available item of evidence. What if A, B and C are tried together? In such a case the prosecutor *initially* may offer any item against one or against two only. But if the trial court thereafter makes a preliminary determination that all three defendants have conspired, each item previously admitted now becomes *admissible* against all.[40] The settled previous rule required *the trial judge to make full use* of such admissibility by *fully enlarging* the application of the evidence, *i.e.*, by telling the jury that every item may be considered against A, B and C. Is a rule constitutional which allows the *prosecutor* to specify a lesser degree of enlargement?

The havoc wrought by the new rule in a relatively simple case is shown in the Second Trial. There the prosecutor began by introducing some 200 items of evidence against 14 defendants charged with conspiring to bribe (Indictment 11908), and a fifteenth defendant, Hanley, charged with requesting bribes, each item being limited to the particular defendants to whose conduct it related.[41] Then the trial judge made a preliminary determination that 8 defendants had conspired as charged in 11908. The established rule (as it stood prior to the decision in this case) next called upon the trial judge to make a simple statement to the jury: Henceforth you may consider against each of the 8 defendants in 11908 any evidence previously introduced against any of them. *Commonwealth* v. *Benesch*, 290 Mass. 125, 132-133.

Instead, the *prosecutor* selected a portion of the items

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[40] A post-conspiracy admission or confession is not subject to the rule. Cf. *Blumenthal* v. *United States*, 332 U.S. 539; *Commonwealth* v. *McDermott*, 255 Mass. 575. No item now under discussion is of that kind.

[41] The bribery indictment against Local played no substantial part in the trial.

already admitted (ignoring the remainder)[42] and specified those of the eight defendants against whom each selected item was to be additionally admitted. The result is shown on Figure 2 (p. 11.)[43] Such selective broadening of selected items could be conveyed to the jury only by recalling each item to its attention and telling it the additional names chosen by the prosecutor. Ten pages of instructions (in the course of which the judge cannot avoid summarizing the prosecution case) replace the one-sentence removal of limitations called for by *Benesch*.

The Court below does not overrule *Benesch*, but holds that nothing in that case prohibits what the prosecutor was here permitted to do. (App. B, pp. 124, 185-186). Clearly, therefore, under the decision below, the prosecutor was free: 1) to request the simple one-sentence instruction removing all limitations or 2) to request the instructions indicated on Figure 2.[44] In case #1 the jury would unques-

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[42] The effect was to leave intact the *original* limitations upon the items ignored.

[43] A blank square found under the name of a defendant on Figure 2 shows a decision by the prosecutor that the particular item shall not apply to that defendant. These blanks derive from the dashes shown in the trial judge's tabulation (App. F, pp. 6-23 inc.), of which he wrote "... A dash '—' in any place under the name of a defendant indicates that such evidence was not originally offered as to that defendant and is not now being offered against him or it ..." (App. F, p. 2).

[44] The Supreme Judicial Court suggests that the "selective expansion" in the Second Trial was not the free choice of the prosecutor, but was based on a "rationale" that evidence of A's acts be admitted against B only if they occurred while B was "active in the conspiracy." (App. B, pp. 185-186, quoting from the trial judge's opinion of Nov. 30, 1967; App. F, pp. 3-4.) When the petitioners and other defendants filed motions to strike based on that "rationale" (see App. G, pp. 1-3), the trial judge denied that there was any such rule. (App. G, pp. 3-4). That denial is fully set forth *and approved* by the Supreme Judicial Court earlier in its opinion. (App. B, pp. 124-126). Note that the fourth sentence of the quotation in n. 67, p. 125 should begin "We are *now* faced ..." (App. G, p. 3.)

tionably understand and remember the instruction; in case # 2, as the court below admits, "... it is highly improbable that the jury could or did remember all the limitations on all the evidence..." (App. B, p. 123). In case # 2 the giving of the instructions requires the trial judge to summarize, in mid-trial, the prosecutor's evidence; not so in case # 1.[45]

The conferring upon the prosecutor[45a] of such a quantum of power is, we suggest, in itself a denial of Due Process. From the fact that a prosecutor may refrain entirely from offering a given item it does not follow that he may properly be given power, once an item has been admitted, to determine its final application. That must be determined by rules of law applied by an independent magistrate if the defendant is to receive a "fair trial in a fair tribunal." *In re Murchison*, 349 U.S. 133. *Figueroa Ruiz* v. *Delgado*, 359 F.2d 718 (1st Cir., 1966). If a prosecutor cannot act as a "neutral and detached magistrate" to issue a search warrant, as this Court unanimously held in *Coolidge* v. *New Hampshire*, 403 U.S. 443, 453; 91 S. Ct. 2022, 2029-2030 (1971), it follows *a fortiori* that he cannot be given power

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[45] The prosecutor's decision to abandon *Benesch* thus directly harmed *all* defendants. The court below is plainly wrong in holding that petitioners must further show that "... the selective broadening of evidence was intended to, or in fact resulted in, *putting them in a worse position than other defendants who were subject to this procedure*." (App. B, p. 124; italics ours.)

If Glynn were the sole defendant of course he could not complain that damaging evidence was not admitted against him. (See App. B, p. 126.) As one of several defendants he (and each of the others) *may* indeed complain that "less evidence was broadened to apply to *them* than might properly have been" (See App. B, pp. 124, 126) because *such a broadening process* converts a single trial into a number of separate trials held simultaneously in the same room. See Figure 2.

[45a] As to the First Trial the court below concedes that "... the judge lifted limitations on 48 items of evidence *to the extent requested by the Commonwealth*, without admitting this evidence against all of the conspirators." (App. B, p. 122; italics ours.)

to decide upon the final application of evidence admitted at a trial of multiple defendants.

III. The Decision Below Conflicts With the Decisions of Two Courts of Appeal That the Submission of Special Questions to the Jury in a Criminal Case Denies Due Process of Law.

As the Supreme Judicial Court itself concedes, "... it is highly improbable that the jury *could or did* remember all the limitations on all the evidence ..." (App. B, p. 123, italics ours.) We suggest that they were in fact in a state which rendered them extraordinarily susceptible to the direction of the trial judge not to approach at once the question of guilt on the bribery charges, but first to answer "Did the defendant give?" Next: "Did he offer?" Finally, "Did he promise?" A single affirmative answer compels the bewildered and weary jury to bring in a general verdict of guilty, even though there is so little evidence of payment that the jury finds none was made.

The court below ruled that the submission of special questions to the jury with the instruction that they be answered *prior* to the return of general verdicts, did not deprive "... defendants of their rights to due process and fair trial" (App. B, pp. 110-111.) The decision conflicts with the principle stated in *United States* v. *Spock*, 416 F.2d 165, 180-183 (1st Cir., 1969) where the trial court submitted to the jury special questions to be answered only if a general verdict of guilty had been reached. While the reversal in *Spock* was arguably based on the court's supervisory power, it was decided long before *Spock* that the submission of special questions to the jury—absent special circumstances not existing in this case—violates Due Process requirements. *Gray* v. *United States*, 174 F.2d 919, 923-924 (8th Cir., 1949).

We suggest that the prosecution has the usual burden of showing that the error was harmless. *Chapman* v. *Cali-*

fornia, 386 U.S. 18. That cannot be demonstrated by saying that the answers to the special questions were "... not inconsistent with and were superseded by the verdicts." (App. B, p. 111.) The issue is whether the asking of the questions played a part in bringing about the verdicts. The consistency of the answers and the verdicts supports an affirmative answer and thus indicates that the error was ***harmful.***

IV. Since Chief Prosecution Witness and Prosecutor Both Testified (Without Contradiction) That Witness Requested, and Prosecutor Agreed, That Witness' Expense Reports Not Be Used in Any Public Proceedings, the Decision Below Directly Conflicts With Decisions of This Court That the Intentional Suppression of Evidence by the Prosecutor Violates Due Process.

During the second trial Heath testified that he had been promised by the prosecutor Simonds that his "... expense accounts were not to be used at any trial." Simonds testified "... I told him (Heath) that I understood his hope and request that they (Heath's expense reports) would not in any way become involved in any public proceedings, and ... (that) I would do what I could to accomplish that *as long as my efforts did not interfere with the proper investigation of the matter* ..." These two accounts are not in conflict—if believed, they establish an intentional suppression of evidence in violation of the well-settled rule. They were brought before the trial judge by motion for new trial (in the First Case) and supporting affidavit. The Commonwealth filed no counter-affidavit, and introduced no evidence.

The court below attempted to dispose of the present point, without examining the evidence, by saying "The judge

found that no such deal was made and this finding was not clearly erroneous." (App. B, p. 132.)

Since the consummation of the "deal" deprived petitioners of Due Process of Law, this Court is not bound by the trial judge's finding, and may make its own finding upon re-examination of the testimony of Heath and Simonds. *Haynes* v. *Washington*, 373 U.S. 503. *Whitus* v. *Georgia*, 385 U.S. 545. *Cox* v. *Louisiana*, 379 U.S. 536. Great weight must be given to the failure of the prosecution to take steps, including the filing of a counter-affidavit, to contradict the testimony of Heath and Simonds above set forth, especially in view of the fact that both were called to the stand (by other defendants) during the hearings on the motions for new trial. *Chapman* v. *California*, 386 U.S. 18. Cf. *Santobello* v. *New York*, —— U.S. ——, 92 S. Ct. 495 (1971).

The decision of the court below conflicts with decisions of this Court that the intentional suppression of evidence by the prosecutor violates due process. *Pyle* v. *Kansas*, 317 U.S. 213; *Alcorta* v. *Texas*, 355 U.S. 28; *Napue* v. *Illinois*, 360 U.S. 264; *Miller* v. *Pate*, 386 U.S. 1; cf. *Brady* v. *Maryland*, 373 U.S. 83; *Giles* v. *Maryland*, 386 U.S. 66.

Conclusion

For the reasons set forth above a writ of certiorari should issue to review the judgment and opinion of the Supreme Judicial Court.

Respectfully submitted,

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